SUPREME COURT, U. S.

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JOHN F. DAVIS, C

IN THE

Supreme Court of the United States

October Term, 1969.

No. 1121.

CITY OF NEW YORK,

Appellant,

v.

UNITED STATES OF AMERICA, AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AND AMERICAN MOTORS CORPORATION,

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF OF AMICI CURIAE, COUNTY OF LACKAWANNA, ET AL. IN SUPPORT OF JURISDICTIONAL STATEMENT.

DAVID BERGER,
HERBERT B. NEWBERG,
H. LADDIE MONTAGUE, JR.,
HOWARD L. SCHAMBELAN,
ALAN M. LERNER,
Attorneys for Amici Curiae.

COHEN, SHAPIRO, BERGER, POLISHER AND COHEN,
Twenty-Second Floor,
Philadelphia Saving Fund Building,
Philadelphia, Pa. 19107
Of Counsel

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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BRIEF OF AMICI CURIAE, COUNTY OF LACKAWANNA, ET AL. IN SUPPORT OF JURISDICTIONAL STATEMENT.

The counties of Lackawanna and Luzerne, Pennsylvania, the City of Buffalo, New York and the County of Erie, New York file this brief as *Amici Curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

I.

INTERESTS OF AMICI CURIAE.

Each of the *Amici Curiae* herein (hereinafter collectively referred to as "*Amici*") are a political subdivision as identified below:

County of Luzerne, Pennsylvania
County of Lackawanna, Pennsylvania
City of Buffalo, New York
County of Erie, New York

and as such, share common interests with Appellant, City of New York. In addition, each of the *Amici Curiae* are plaintiffs in a private treble damage action[1] against the defendants and co-conspirators named in *United States of America v. Automobile Manufacturers Association, Inc.*, Civ. Action No. 69-75 (C. D. Cal.), plaintiffs being representatives of a class pursuant to F. R. C. P. 23, the class being defined as:

> "... all municipalities, county and local governments, states and public bodies in the United States, their citizens and members of the public whom they serve ..."

Accordingly, if the defendants have committed the acts alleged by the United States and by *Amici* and the members of the class they represent, *Amici* as well as Appellant have suffered substantial injury to their business and property. Indeed, it is the interests of *Amici* and others similarly situated that the relief requested by the Federal Government Action was designed to protect. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 135, 17 L. Ed. 2d 814, 819, 87 S. Ct. 932 (1967). See *Association of*

1. County of *Lackawanna, Pennsylvania, et al. v. Automobile Manufacturers Association, Inc., et al.*, Civ. Action No. 70-398 (E. D. Pa.)

Data Processing Service Organizations, Inc. v. Camp, U. S. Supreme Court Docket No. 85 (Opinion March 3, 1970); *Barlow v. Collins*, U. S. Supreme Court Docket No. 249 (Opinion March 3, 1970). For these reasons *Amici* are vitally interested in and will be greatly affected by the outcome of this appeal.

II.

ARGUMENT.

The Proposed Consent Decree Without Any Admission of Liability by the Defendants Was Improperly Entered in That It Adversely Affects the Interests of State and Local Governments and Their Citizens and Does Not Rectify the Deleterious Effects Caused by Defendants' Acts.

The consent decree accepted and entered by the District Court did not contain a clause giving the decree prima facie effect in private treble damage actions pursuant to § 5(a), Clayton Act. The Federal Rules of Civil Procedure as well as basic jurisdictional statutes provide the District Court with power to refuse to approve a consent decree absent the § 5(a) clause.[2]

Potential recoveries in private treble-damage actions are the most effective deterrent of violations of the antitrust laws. In exercising their discretion whether or not to accept *nolo* pleas or whether or not to approve stipulated consent judgments, courts should consider whether or not prima facie evidence will be available to plaintiffs in later private civil actions. See Nolo Pleas in Antitrust Cases, 79 Harv. L. Rev. 1475, 1481-82 (1966). "In cases of serious violations

2. "It is certainly within the power of the court to reject a proposed decree even when both sides consent." Dabney, *Consent Decrees Without Consent*, 63 Col. L. Rev. 1053, 1064 (1963).

where substantial private injury has resulted, the policy of Section 5 should override any special considerations that would deny the evidentiary aid to injured parties and would permit defendants to avoid private liability." Section 5 of the Clayton Act and the Nolo Contendere Plea, 75 YALE L. J. 845, 867-68 (1966). By the proviso excluding consent decrees from the operation of the prima facie effect of government proceedings, Congress did not intend to open the door to any willing defendant to escape from obligations for restitution to injured parties arising from its wrongdoings.

> "Congress made convictions in contested cases and convictions after guilty pleas binding in later suits; to argue that Congress meant, at the same time, to allow any defendant to escape who chose to by saying the magic Latin words is to make a mockery of the policy supporting section 5(a). And since the main purpose of that policy was to aid plaintiffs in treble damage suits, it seems that the effect on such suits should be considered when the court, by accepting or rejecting nolo, determines whether the defendant will be excepted from section 5(a)." Nolo Pleas, supra, 79 Harv. L. Rev. at 1483.

There are compelling reasons why the consent decree in this case should have provided for its prima facie effect in subsequent actions:

a. The Subject Matter Is Vital to Life and Well Being.

This Court may take judicial notice of the immediate grave threat of air pollution to our country. Where the subject matter of an antitrust violation concerns such a vital element necessary to life, the courts should scrutinize the consent decree in light of its overwhelming importance

to public interest and welfare. In *U. S. v. Toledo Milk Distributors Association*, 1954 Trade Reg., ¶ 67,918 (N. D. Ohio 1954), the District Court refused to accept pleas of *nolo contendere* in a criminal antitrust action on the ground that the complaint contained allegations of price-fixing for sales of a vital commodity, milk.

b. The Public Interest Can Be Served Adequately Only by a Consent Decree With a Prima Facie Effect or by a Trial on the Merits.

The consent decree in its present form enjoins the defendants from continuing the acts alleged to be in violation of the Sherman Act. The court below reasoned that the decree brings immediate assured results and avoids a tremendous expenditure of taxpayer's money. (App. A, 5a, 14a-15a). These stated benefits of the decree are illusory.

There is no avoidance of "a tremendous expenditure of taxpayers' money." The Government has already made a vast investment in its grand jury investigation. A Government trial would only harvest the fruits of that investment. Furthermore, the savings to the Federal Government in not conducting a trial will be surpassed greatly by the expenditures which will necessarily be made by state and local governments in enforcing their rights and the rights of their citizens. Instead of taxpayers' money being expended by the Justice Department in the prosecution of one trial beneficial to all subsequent related actions, those same taxpayers will be expending a greater amount of money at the state and local government level in the prosecution of a myriad of treble damage actions scattered throughout the various judicial districts.

The alleged benefits from the consent decree of granting the Justice Department the immediate assured results it desired is also illusory. That same result would most

probably be reached by a Government request for a preliminary injunction.[3] Likewise, the result would most likely come about in this case due to the almost unprecedented amount of public and governmental pressures placed upon the defendants and others to clean up and preserve our atmosphere. This pressure is caused by today's concern of the lethal problem of environmental pollution.

Although the consent decree may cause defendants to cease their past activities, it contributes nothing toward rectifying the harm which their alleged acts have caused.

In *New Jersey Wood Finishing Company v. Minnesota Mining & Manuacturing Company*, 381 U. S. 311, 318, 85 S. Ct. 1473, 14 L. Ed. 2d 405, 411 (1965), this Court emphasized that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective inforcement of the antitrust laws." In discussing the impact of § 5(a), the Court stated:

> ". . . in framing § 5(a) Congress focused on the narrow issue of the use by private parties of judgments or decrees as prima facie evidence. This was recognized in Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 95 L. ed. 534, 71 S. Ct. 408 (1951), where we stated that the purpose of § 5(a) was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions' and to permit them 'as large an advantage as the estoppel doctrine would afford had the Government brought suit,' Id., at 568, 95 L. ed. at 544." 381 U. S. at 317.

It is clear that with respect to the present antitrust violations charged against the defendants, the circum-

3. At the very least, it appears that the Government should attempt to obtain preliminary relief before it enters into a consent decree, especially where prompt relief is a major factor in its decision to obtain a consent decree.

stances are proper to blend the effectiveness of private antitrust litigation with the skill and resources of the Justice Department in redressing completely the deplorable conditions to which the defendants have contributed.

Apart from the importance of the issues involved and their direct impact throughout the United States, there is an additional reason that this Court should review the actions of the District Court. This appeal comes to this Court directly from the District Court, in accordance with the Expediting Act of February 11, 1903, 15 U. S. C. Sec. 29. Absent review by this Court, appellant has no other forum to which to turn for review of what it considers to be erroneous rulings by the District Court.

> "(I)n antitrust cases . . . our practice, particularly in cases of direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violations proved. 'The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court.' . . . International Boxing Club v. U. S., 358 U. S. 242, 253, 3 L. Ed. 2d 270, 278, 79 S. Ct. 245 (1959) . . .
>
> "(T)he suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it . . .
>
> "Our practice reflects a situation created by the congressional authorization, under Sec. 2 of the Expediting Act, of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of

intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '. . . it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' Hartford-Empire Company v. U. S., 324 U. S. 570, 571, 89 L. Ed. 1198, 1200, 65 S. Ct. 815 (1945)." U. S. v. DuPont De Nemours & Company, 366 U. S. 316, 323-35, 81 S. Ct. 1243, 6 L. Ed. 2d 318, 323-24 (1961).

III. CONCLUSION.

This Court is called upon to determine questions most significant to the full scheme of enforcement of the anti-trust laws. The particular case in which these issues are raised will have meaningful and lasting effects throughout the United States. Accordingly, *amici curiae* respectfully urge that this Court review whether the district court adequately considered whether the consent decree in its present form was proper and whether the public interests of Appellant, *amici curiae* and others similarly situated were adequately protected in the proceedings below.

Respectfully submitted,

DAVID BERGER,
HERBERT B. NEWBERG,
H. LADDIE MONTAGUE, JR.,
HOWARD L. SCHAMBELAN,
ALAN M. LERNER,
Twenty-Second Floor,
Philadelphia Saving Fund Bldg.,
Philadelphia, Pa. 19107,
Attorneys for Amici Curiae.

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POLISHER AND COHEN,
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Of Counsel.